(76)

No. 02-1624

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2003

ELK GROVE UNIFIED SCHOOL DISTRICT,
and DAVID W. GORDON, Superintendent, EGUSD,
Petitioners,

vs.

MICHAEL A. NEWDOW,
Respondent,

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I

RESPONDENT HAS FAILED TO ESTABLISH THAT HE HAS STANDING TO BRING THIS ACTION.

The child custody order governing Respondent Michael Newdow's right to direct the educational and religious upbringing of his daughter precludes him from having an appropriate personal stake in the outcome of this action; therefore there is no "concrete adverseness" between Respondent and Petitioners. Specifically, Respondent concedes that the mother of his daughter has final decision making authority with respect to the upbringing of their child. *Resp. Brief* at 46; J.A. 127-28.[1] *See also Brief of Amicus Curiae Sandra L. Banning* at 2-6. Ms. Banning has declared that her final decision is to raise their daughter as a Christian, that their daughter wants to say the Pledge of Allegiance ("Pledge") with the words under God, and that it is her intent that their daughter recite the Pledge as it currently stands. J.A. 83-84.

Respondent admits that if he disagrees with Ms. Banning's decision, he may seek review of that decision by the State Court having jurisdiction over the custody action. *Resp. Brief* at 46-47. Respondent further admits he has not challenged Ms. Banning's decision in the California Family Law Court ("Family Court"). *Id.* at 39-40, n.61. By attempting to bypass review of the Family Court decision, Respondent has exceeded his rights under the

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[1] Following the filing of the Brief on the Merits, but prior to the filing of Respondent's Brief in Opposition, the Family Court issued an interim Custody Order filed January 9, 2004. This written Order is generally based on the Court's ruling at the custody hearing on September 11, 2003. A copy of the Order filed January 9, 2004 is set forth in the Reply Appendix.

Custody Order and/or asserted an impermissible collateral attack on the State Court custody action. Affording Respondent standing to assert an alleged violation of the U.S. Constitution when the custody order otherwise limits his constitutional rights would unnecessarily interfere and disrupt the Family Court's ability to perform its function. Finally, and perhaps most importantly, this Court should not permit Respondent to interfere with an activity such as the Pledge which is an integral part of the curriculum of his daughter's public school, when his position is contrary to both his daughter's wishes and Ms. Banning's decision on the issue. Rather, Respondent should be required to seek review of what is in the best interest of the child in the State Court.

1. Respondent Has Not Had Standing at Every Stage of the Litigation.

Respondent has not made the requisite showing that his required standing has existed at every stage of litigation. *See Arizonans for Official English v. Arizona,* 520 U.S. 43, 67 (1997). Specifically, Respondent lacked standing before the Ninth Circuit Court of Appeals. He also lacks standing before this Court.

By order of the Family Court dated February 6, 2002, Ms. Banning was awarded sole legal custody of their daughter. J.A. 82; *Resp. Brief* at 40, 46. That Order remained in effect until September 11, 2003. J.A. 89-131. California law defines sole legal custody as one parent having the right and responsibility to make the decisions relating to the health, education and welfare of a child. Cal. Family Code § 3006. Because Ms. Banning had sole legal custody and was the primary custodial parent during this time, she had sole decision making powers regarding the health, education and welfare of the child. While Respondent could expose his daughter to his atheist beliefs and practices while she was in his physical custody, he could not make final decisions with

respect to her educational and religious upbringing between February 6, 2002, and September 11, 2003.

During that period, the Ninth Circuit Court of Appeals rendered its original opinion, the amended opinion, as well as the opinion that Respondent had standing to assert his claims. The Family Court also enjoined Respondent from representing his daughter as "next friend." J.A. 133-34. Because Respondent did not have the legal authority to direct the educational and religious upbringing of their daughter, he could not have suffered a distinct and palpable injury during a substantial period of time this matter was pending before the Ninth Circuit Court of Appeals.

While this matter has been pending before this Court, Respondent's custodial rights have been defined by the Family Court ruling on September 11, 2003, and the order filed January 9, 2004. *Reply App.* at 1a-17a. Specifically, Ms. Banning retains final decision making authority with respect to the child's health, education and welfare. *Id.* at 14a. Ms. Banning also retains primary physical custody. Thus, Ms. Banning remains the custodial parent and Respondent the non-custodial parent. *See, e.g., In re Marriage of Burgess,* 13 Cal.4th 25 (1996); *County of Ventura v. George*, 149 Cal.3d 1012, 1018 (1983). In the event Respondent disagrees with the decision made by the mother regarding their daughter's recitation of the Pledge, his recourse is to bring the matter before the Family Court to determine whether that is in the best interest of the child. He has not done so.

For example, in a recent ruling on March 1, 2004, the Family Court denied Respondent's request to have his daughter attend the oral argument before this Court finding it would not be in the best interest of the child. This ruling demonstrates Respondent does not have the unfettered right to make personal decisions regarding his daughter over the mother's objection, much less the ability to make decisions regarding the education of his daughter.

2. Respondent's Custodial Standing Arguments Fail.

Respondent asserts that the Family Court acknowledged its orders did not deprive him of standing. *Resp. Brief* at 41. The Family Court Judge merely stated he did not know why Respondent would not have the right to bring an action of a generalized nature.[2] The Judge did not indicate Respondent could bring an action to challenge decisions regarding how the school is providing an education to his daughter when the legal authority to make such decisions is vested in the mother. Moreover, the Judge did not analyze Respondent's claims in this case or make a ruling that conferred standing on Respondent to bring this action.

Respondent next argues he has standing because California Education Code section 51100 provides parents with certain rights of access to school records and to participate in the educational process. *Resp. Brief* at 43. That participation, however, is expressly limited by California Education Code section 51101(d) which states that a school is not permitted to allow a non-custodial parent to participate in the education of a child if it conflicts with a valid custody order. Thus, the California Legislature recognized not only that non-custodial parents should be permitted to participate in the education of their child, but that there may be occasions when the non-custodial parent's interest conflicts with the rights of the custodial parent and in that instance, California law requires that the school comply with the custody order. Thus, the fact that Respondent is permitted to participate in the education of his daughter in the Elk Grove Unified School District ("EGUSD") does not entitle him to any greater rights than he had

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[2] If anything, the Judge's reference is best interpreted as indicating Respondent might have taxpayer standing to bring an action.

pursuant to the custody order.[3]

Respondent also relies upon the conclusion of the Ninth Circuit Majority Panel that his daughter will be taught that his beliefs are inferior. First, there is nothing in the record to show that EGUSD would teach students that Respondent's Atheist beliefs are inferior. In fact, if a student or parent objected to reciting the Pledge, then EGUSD would make every effort to explain that those beliefs should be equally respected. Although Respondent also expresses concerns that his daughter may be conflicted when her teacher recites a belief she knows her father denies, this begs the question that his daughter wants to recite the Pledge. Thus, both of these arguments demonstrate that Respondent's objection to willing students reciting the Pledge in the EGUSD is not a matter which should be before this Court, but should be reviewed by the state court to determine whether it is in the best interest of the child.

Respondent seeks to distinguish *Navin v. Parkridge School District*, 270 F.3d 1147 (7th Cir. 2001), on the grounds that his objection to his daughter reciting the Pledge is not incompatible with the rights of the mother because the custody order does not give the mother the right to direct how to educate their daughter. *Resp. Brief* at 44. However, in *Navin* the Seventh Circuit determined that a non-custodial parent lacks standing to contest issues involving the educational upbringing of his child if the right sought to be protected is incompatible with the exercise of that right by the custodial parent. That is precisely the issue here.

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[3] Respondent's claim that the EGUSD still allows him to volunteer in class, communicate with school officials, address school board meetings and meet with teachers on issues is unsupported in the record. Likewise, there is nothing to indicate that this is incompatible with the mother's interest and decision making under the custody order to direct the education of their daughter.

The record in this case demonstrates that the mother and child have made a voluntary choice to follow the EGUSD Patriotic Observance policy. J.A. 83-84. Because the policy only applies to willing students, the mother and daughter may opt out if they so choose. As Respondent is actually challenging the decision of the mother and their child to participate in the Pledge exercise, Respondent cannot establish that the EGUSD policy caused his alleged injury.

3. Public Policy Supports a Finding that Respondent Lacks Standing.

Petitioners submit that public policy dictates a finding that Respondent should not be allowed to interfere with the curriculum of a school district when he does not have the legal right to do so under state law. State family law courts should not be subject to a collateral attack which would allow litigants to avoid the State Court's determination as to what is in the best interest of the child. State family law courts are best positioned to assess the respective needs of parents and their children. Often times, family courts take on the role of advice counselor to help the parents deal with their problems and assist with the raising of the child. The best example of this is the current custody order involving Respondent and Ms. Banning, which is replete with admonishments and directives as to how they can better cooperate with each other in raising their daughter.

Respondent's objection to his daughter's voluntary recitation of the Pledge is no different than any other objection or disagreement he may have with respect to final decisions made by the mother as to the educational and religious upbringing of their daughter. Now that their daughter is almost ten years old, the state family law court will be seeking her input to determine what is in her best interest. In this instance, it would appear that the position

of the mother and child would be quite persuasive. If the integrity of the state family law system is to be maintained, Respondent should not be given standing to bypass it in this case.

4. Respondent's Claims Are Barred by the *Rooker-Feldman* Doctrine.

Respondent maintains that the *Rooker-Feldman* Doctrine does not apply in this case since he has not attempted to challenge a state custody determination in federal court. *Resp. Brief* at 40, n.61. The question is not whether Respondent specifically asserted the claim in this case or some other challenge to the constitutionality of the state custody proceeding in federal court. Rather, the issue is whether his claim regarding Petitioner's Pledge policy is inextricably intertwined with Respondent's child custody case. The basis for Respondent's claim in this case is his fundamental disagreement with the decision making of the mother and their daughter to voluntarily recite the Pledge. Respondent went so far as to represent his daughter as "next friend" without legal authority to do so. Both of these issues were family court issues. Moreover, Respondent has not challenged the mother's decision in state court, most likely to avoid a determination that the voluntary reciting of the Pledge is in the best interest of his daughter. The declaration submitted by Ms. Banning in the child custody case evidences her final decision that she allows their daughter to voluntarily recite the Pledge and review by this court on the merits would interfere with the rights of the mother and the daughter, as well as the state court to oversee the family custody case. Therefore, Petitioners respectfully submit that this case is sufficiently intertwined with the child custody case that the *Rooker-Feldman* Doctrine bars federal review.

5. Respondent Does Not Have Observer or Taxpayer Standing.

Respondent asserts that he has standing to challenge the EGUSD's policy because he volunteered at the school, witnessed his child being "indoctrinated" with the disputed religious dogma, and has himself been led by the child's teachers in reciting the pledge. *Resp. Brief* at 47-48. However, Respondent cites no authority to support the proposition that he has observer standing.

Respondent could not have been "led" by the teachers in reciting the Pledge as he, like anyone, can choose whether or not to recite the Pledge. Certainly, the EGUSD Patriotic Observance policy did not require him to recite the Pledge. Thus, Respondent does not have standing as there is no direct injury to Respondent in observing the recitation of the Pledge. Instead, the only alleged injury is via his child.[4]

To support taxpayer standing, Respondent must show that he paid taxes directly to the public entity and that those tax revenues were expended solely on the disputed practice. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 613-14 (1989); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789 (9th Cir. 1999) (holding no taxpayer standing to challenge school policy because there were no allegations that the taxes were spent solely on the challenged activity). There is nothing in the record that Respondent paid taxes directly to the public entity or that those taxes were expended solely on the challenged conduct. Thus, Respondent does not have taxpayer standing to challenge the EGUSD Patriotic Observance policy.

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[4] *Lee v. Weisman*, 505 U.S. 577 (1992), is distinguishable in that the father had standing as "next friend," while in this case, the Family Court forbade Respondent from asserting standing as "next friend."J.A. 133-34.

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II

RESPONDENT HAS NOT ESTABLISHED THAT THE EGUSD PATRIOTIC OBSERVANCE POLICY IS UNCONSTITUTIONAL.

1. *West Virginia State Board of Education v. Barnette* Allows Recitation of the Pledge in Public Schools.

Respondent failed to address the fact that this Court has previously ruled that recitation of the Pledge in public schools, despite the religious objections of others, does not run afoul of the Establishment Clause.[5] *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Petitioners submit this is because the parallels between the objections to the Pledge recitation in *Barnette* and Respondent's objections to the Pledge recitation here are indistinguishable.

In *Barnette*, the Board of Education adopted a resolution that required the Pledge to become "a regular part of the activities in public schools" and all teachers and students to participate in the flag salute. *Id.* at 626. Jehovah's Witnesses, refused to salute the flag because their religious beliefs prevented them from subsuming themselves to images such as the flag. *Id.* at 629. As a result, children of the faith were expelled from school. *Id.* at 630. This Court held that local authorities could not compel the flag salute and recitation of the Pledge. *Id.* at 642. The result from that decision is that for the past sixty years school districts across the country can only require willing students to recite the

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[5] Petitioners recognize that the Pledge did not contain the phrase "under God" when *Barnette* was decided; nevertheless, the case dealt with a religious objection to recitation of the Pledge in a public school classroom.

Pledge. Petitioner EGUSD, for one, accommodates students who object to the Pledge by not requiring those students to recite it and encourages mutual respect of religious beliefs..

Parents of the Jehovah's Witness students who objected to their children's compulsory recitation of the Pledge in *Barnette* for religious reasons were in no different position than Respondent who does not want his child to recite the Pledge, or even hear the Pledge, for his own religious reasons. In those circumstances, this Court did not find that religious objections require that the Pledge be eradicated from the public school setting so students would not be subjected to conduct that contradicted their religious beliefs. *Id.* Instead, the Jehovah's Witnesses rights were protected as long as they were not required to salute the flag or recite the Pledge. *Id.* Similarly, Respondent's religious objection to the Pledge does not require banishment of the Pledge from public schools. Respondent's right to object to the recitation of the Pledge is preserved by his theoretical right to direct his child not to recite it.[6] Thus, consistent with *Barnette*, mere exposure to the Pledge does not constitute a violation of the Establishment Clause.[7]

Barnette's effect on the instant case is even more pronounced in light of Respondent's proffered rationale for finding the Pledge unconstitutional. For example, Newdow argues that the EGUSD's Patriotic Observance policy in effect sends a message to "nonadherents that they are outsiders, not full members of the political community," and states that Petitioners have a duty to

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[6] As indicated in the preceding section and the Brief on the Merits, Petitioners do not believe Respondent actually has the right to direct his child as to whether or not she should recite the Pledge while in school.

[7] Exposure to an idea in the classroom does not constitute coercive teaching, indoctrination or the promotion of a particular value or religion. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1063 (6th Cir. 1987).

remedy situations where students are turned into outsiders. *Resp. Brief* at 14.[8] Surely Respondent would agree that the Jehovah's Witness students who refuse to recite the Pledge may also feel like "outsiders" or "not full members of the political community" because of their religious objection to the Pledge. However, this Court did not banish the Pledge from public school classrooms because of such potential effects. Instead, it allowed recitation of the Pledge to continue. Similarly, it should allow voluntary recitation of the Pledge to continue in the instant case.

"Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations." *Barnette*, 319 U.S. at 634. Thus, there will always be persons who consider themselves to be "outsiders" because they do not agree with everything contained in the Pledge or even the fact that a Pledge exists. Nevertheless, this Court has never questioned its decision sixty years ago in *Barnette* that resulted in the continued recitation of the Pledge in public schools. Indeed there is nothing in the record to indicate that either parents or students have objected to mere exposure to the Pledge during the post-*Barnette* era. Petitioners believe this is due to the fact that similar to the EGUSD, schools across the nation protect the rights of students who do not want to recite the Pledge by promoting mutual respect of different beliefs.

Respondent quotes *Jones v. Opelika*, 316 U.S. 584, 624 (1942) (Black, Douglas, Murphy, JJ, dissenting), *overruled on other grounds* (citation omitted), to assert that Petitioners have a responsibility to accommodate minority religious views. *Id.* at 28. *Jones* was decided one year before *Barnette*, yet it did not result in this Court ruling that the Pledge be taken out of public school classrooms to accommodate the religious views of Jehovah's Witnesses. While this Court did not analyze *Barnette* as an accommodation to the Jehovah's Witnesses, the inference is that an appropriate accommodation resulted in the decision that neither Jehovah's Witnesses, nor anyone else, can be compelled to recite the Pledge. Thus, an appropriate accommodation of Respondent's self-proclaimed minority religious view is found in *Barnette*, i.e. neither he nor anyone else is compelled to recite the Pledge.

Respondent's outsider concern is also diminished by the effect of the diversity that flourishes in our society and pubic schools. For example, eighty-four different languages are spoken by students in the EGUSD. Undoubtedly, this reflects diversity of national origin, religious beliefs and varied customs which translates into religious diversity in the EGUSD. Therefore when a parent objects to their student reciting the Pledge, the EGUSD is able to take advantage of this opportunity to teach respect and tolerance of the objecting party's beliefs. This diversity has been and will continue to be a cause for celebration — not an opportunity to make a person feel like an outsider.

The continued voluntary recitation of the Pledge in public schools after *Barnette* demonstrates that objection to recitation of the Pledge for religious reasons does not require the abolishment of the Pledge from the EGUSD. Nor do such objections require amendment of the Pledge as currently codified. Instead, the sixty years of successful practice post-*Barnette* demonstrates that religious objections to the Pledge are properly addressed so long as students are not required to recite the Pledge. Thus, the EGUSD policy challenged in the instant case is constitutional.

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[8] It is interesting to note that this objection is not applicable in the instant case as there is no evidence in the record that indicates Newdow's daughter has been made to feel like an outsider because she does not want to recite the Pledge. In fact, the record reflects that she actually wants to and does recite the Pledge. J.A. 83-85. Thus, Newdow's objection is really that he feels like an outsider — which is not at issue in this case.

2. The EGUSD Patriotic Observance Policy Does Not Violate the Establishment Clause.

Respondent repeatedly questions the constitutionality of the Pledge. The specific issue in this case is, however, whether the EGUSD Patriotic Observance policy violates the Establishment Clause. Examination of the policy reveals that it is constitutional.

A statute or policy violates the Establishment Clause if it is wholly motivated by religious considerations. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). Here, there is nothing in the record to establish or even infer that the EGUSD policy was in any way motivated by religious considerations. Instead, the policy was adopted to promote patriotism and satisfy California Education Code section 52720, which requires every public elementary school to conduct appropriate patriotic exercises each day. Recitation of the Pledge is recognized in the statute as satisfying this requirement. *Id.* Significantly, Respondent admits that the EGUSD had the secular purpose of fostering patriotism in enacting the Patriotic Observance policy. *Pet. App.* 48. Thus, the policy does not run afoul of the purpose prong of the *Lemon* and endorsement tests recognized by this Court as analytical tools for evaluating Establishment Clause violations. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Lynch*, 465 U.S. at 688.

Likewise, the policy neither advances nor inhibits religion. Instead, it merely requires willing students to recite the Pledge each day. The effect of the policy is that students recite or hear others recite the Pledge which in turn promotes unity and patriotism. As noted by *Amicus Curiae National School Boards Association*, state approved curricula across the country reveal that the preferred method of teaching elementary-age children ideas such as liberty and citizenship is through the study and recognition of symbols, customs and landmarks, including such things as the Pledge. *Id.* at 17. It is this teaching that helps students see that

Americans as a people share a common set of values even though the nation is diverse. *Id.* at 18. Hence, a policy that requires teachers to lead willing students to recite the Pledge does not result in an Establishment Clause violation.

Respondent has not set forth any argument regarding the excessive entanglement prong of the *Lemon* and endorsement tests resulting from the EGUSD Patriotic Observance policy. Clearly this is because no "comprehensive, discriminating and continuing state surveillance" is necessary. *Mueller v. Allen*, 463 U.S. 388, 403 (1983). Therefore, the policy does not violate either the *Lemon* or endorsement tests.

While Respondent relies heavily on the coercion test set forth in *Lee v. Weisman*, that test has only been used when a clearly religious activity is at issue. As demonstrated in the next section, the Pledge is not a religious activity; thus, the coercion test is inapplicable. Moreover, listening to other students recite the Pledge does not result in coercion any more than the Jehovah's Witnesses in *Barnette* were subjected to coercion.

Thus, although the Court is not bound by one specific test in evaluating Establishment Clause cases (*see Hunt v. McNair*, 413 U.S. 734, 741 (1973); *Board of Educ. v. Grumet*, 512 U.S. 687, 720 (1984) (O'Connor, J., concurring)), the EGUSD Patriotic Observance policy does not violate the *Lemon*, endorsement and coercion tests.

3. The Pledge Does Not Violate the Establishment Clause.

Rather than focus on the EGUSD policy, Respondent continues to attack the Pledge itself and argues that it is unconstitutional because it contains the words "under God." *Resp. Brief* at 4. He asserts the EGUSD policy results in the daily indoctrination of "sectarian dogma" because the Pledge, as currently codified, takes a position that (1) God exists, and (2) that

the United States is a nation under God. *Id.* Because recitation occurs in a public school setting, Respondent argues that the practice should be invalidated as government sponsored religion in public schools has been struck down in nine cases. *Id.* However, those cases involved religious activity whereas no religious activity exists in this case. Morever, the Pledge does not take a position with respect to whether a God exists or that the United States is one nation under a God.

a. The Pledge Is Not a Religious Activity.

Respondent compares the instant case to the prayer at issue in c, but the two could not be more different. A prayer is a "supplication or expression addressed to God" or an "earnest request or wish." *The New Merriam-Webster Dictionary* 570 (1989). Physically, prayer is done "with bowed head, on bended knee or some other reverent disposition." *Pet. App.* 79. On the other hand, "pledge" is defined as a promise. *The New Merriam-Webster Dictionary* 558 (1989). The Pledge "should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left shoulder, the hand being over the heart." 4 U.S.C. § 4.

The Pledge is not a supplication to God, nor is it an "earnest request or wish." It is not delivered in any manner that is consistent with the way a prayer would be physically delivered. Thus, despite Respondent's attempt to construe it otherwise, it is fundamental that a prayer is a religious activity while recitation of the Pledge is no more than a patriotic activity. This difference is acknowledged in *Engel* where this Court noted that documents that contain references to a deity which are patriotic or ceremonial expressions bear no resemblance to "religious exercise" (prayer in that case). *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962).

Therefore, Respondent's assertion that *Engel* supports a finding that the Pledge violates the Establishment Clause is unavailing.

It is also interesting to note that Respondent claims the New York Regents' intent in *Engel* was to wed God and the Pledge so that each school day the act of pledging allegiance to the flag would be joined with an act of reverence to God. *Resp. Brief* at 5. Yet, in stating that the Regents intended to wed God and the Pledge by requiring the prayer, Respondent tacitly acknowledges that the Pledge is secular and patriotic; otherwise the Regents would not need to accompany it with prayer.

In addition, the public school cases relied on by Respondent are distinguishable as they involved clearly religious activities. *See McCollum v. Board of Educ.* 333 U.S. 203 (1948) (students received religious education at school if they chose, while others attended study hall); *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) (readings from the Bible each day before classes); *Stone v. Graham*, 449 U.S. 39 (1980) (placement of the Ten Commandments in public school rooms); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (statute authorizing daily period of silence for meditation or voluntary prayer); *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation prayer); and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prayer before football games). The Pledge is not equivalent to those activities.

b. The Pledge Does Not Assert That God Exists.

Contrary to Respondent's assertion, the Pledge does not take a position on the question "Does God exist?" *Resp. Brief* at 8. The mere fact that God is referenced in the Pledge does not mean that the government, through the Pledge, is trying to convey that God does or does not exist. Petitioners submit that a reasonable observer reading the Pledge would not determine that the Pledge takes a position that God exists. Instead, a reasonable

observer would merely view the Pledge as a statement of patriotic observance that includes a ceremonial reference to God, much like other historical statements such as the Gettysburg Address or the Declaration of Independence.

Respondent attempts to distinguish references to God in the Declaration of Independence, the Star Spangled Banner, and Lincoln's Gettysburg Address from the Pledge, stating they are acknowledgments which "simply take cognizance of undisputed facts." *Resp. Brief* at 17. Respondent's attempt to distinguish these patriotic expressions is inconsistent. How is the statement in the Declaration of Independence[9] that we are endowed by the Creator with inalienable rights simply taking cognizance of undisputed facts without also taking a position that a God, who endowed us with these unalienable rights, exists?[10] Instead, the Declaration sets forth a political philosophy that humans have inalienable rights apart from the state and the Pledge acknowledges this framework.

Likewise, the endorsement test "does not preclude government from acknowledging religion or from taking religion into account in making law and policy." *Wallace*, 472 U.S. at 70. Further, the First Amendment does not require that in every respect there be separation between church and state. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). Yet Respondent asserts the Pledge fails the endorsement test because it conveys a message that a particular religious belief is favored. *Resp. Brief* at 9.

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[9] Ironically, Respondent asserts that Petitioners need to understand that citizens are not given their fundamental rights. It is of course these inalienable rights that the founding fathers recognized to have come from the Creator.

[10] Similarly, the statement "In God we Trust" on coins and currency, as well as the use of it as our national motto, is as much taking a position regarding the existence of God as the Pledge stating "one nation under God."

Contrary to Newdow's assertion, the actions of the Knights of Columbus, prior legislatures, and Rev. Docherty prior to the inclusion of the words "under God" in the Pledge are irrelevant to evaluating the text, legislative history and implementation of a statute. President Eisenhower's interpretation of what the addition of those words meant to him is also irrelevant.

Respondent fails to consider the fact that the text reveals a political purpose behind the amendment, i.e. the political difference between the United States and Communist countries. The legislators believed that the United States was different from the Communist countries because our government is founded on the idea that people are important because they are created by God and endowed with certain inalienable rights. H.R. Rep. No. 1693, 83d Cong., 2d Sess. 1-2 (1954). Thus, "under God" was added to the Pledge to highlight the underlying differences in the political philosophies of the countries, not for the purpose of recognizing the existence of God.[11]

A reasonable observer would understand the Pledge was not amended to take a position on the existence of God, but instead to highlight the political differences between the United States and the communist nations. As a result, the Pledge does not violate the Establishment Clause.

c. The Pledge must Be Evaluated as a Whole, Rather than Merely by its Parts.

Respondent points to *Santa Fe* and *Lee* to support the

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[11] As the United States points out, some members of Congress might have been motivated in part to amend the Pledge because of their religious beliefs, but "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Br. for the United States* at 37, *citing United States v. O'Brien*, 391 U.S. 367, 384 (1968).

proposition that evaluation of such expressions as the Pledge as a whole would never result in a violation of the Establishment Clause because he asserts football games and graduations are not religious acts. *Resp. Brief* at 20. Respondent misapplies the argument and ignores the fact those cases involved the inherently religious activity of prayer. As the words "under God" in the Pledge are not a prayer or bible reading, nor do they turn the Pledge into a religious activity, it is impossible to evaluate them in the same manner as those activities. Instead, the most analogous cases under the Establishment Clause are *Lynch* and *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), where the alleged religious symbol was considered in the context of its surroundings in determining whether there was an Establishment Clause violation. As demonstrated by Petitioners and the United States in their Briefs on the Merits, when considering the Pledge as a whole, it does not violate the Establishment Clause.

d. The "Fabric of Our Society" Test Provides an Appropriate Analytical Framework.

Respondent attempts to discourage the Court from utilizing the analytical framework set forth in *Marsh v. Chambers*, 463 U.S. 783 (1983), by asserting it has been distinguished from the public school setting. *Resp. Brief* at 30. In *Lee*, this Court reiterated the need for a fact-sensitive inquiry, particularly in the public school context. *Lee*, 505 U.S. at 597. In contrast to a graduation prayer which this Court found was a state sanctioned religious exercise, students' daily recitation of the Pledge is a customary patriotic exercise that more closely parallels *Marsh*. Our national Pledge must be viewed in the far broader context of playing an integral role in our citizenship and patriotism which is recited throughout our country, whether at school, government functions, a wide

variety of extra-curricular activities and naturalization ceremonies.

In applying the *Marsh* framework, Petitioners agree that legislative prayer in Nebraska existed for a longer period of time than has the Pledge in its current form. In determining whether something has become a part of the fabric of our society, however, the issue is not merely the length of time the Pledge has existed in its current form, but also, the extent to which it is ingrained in our society. In *Marsh*, only attendees of the opening of legislative sessions are affected by the legislative prayer, whereas here *every* citizen of the United States has likely participated or been exposed to the current form of the Pledge. Multiple generations of citizens have learned, recited and passed on the Pledge as it currently stands. Based on its customary usage in ceremonies and events for the past fifty years, the Pledge is an integral thread in the fabric of our society.

CONCLUSION

Petitioners submit this Court should find that Respondent does not have standing and thus vacate the decision of the Ninth Circuit Court of Appeals and direct the District Court to dismiss the case for lack of standing. Alternatively, the decision of the Ninth Circuit should be reversed because the EGUSD Patriotic Observance policy does not violate the Establishment Clause.

Respectfully submitted.

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